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No. 194.

Supreme Court of the United States

OCTOBER TERM, 1924.

C. V. BROWNE, PETITIONER,

VS.

THE UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PETITIONER.

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STATEMENT.

This matter is before this court on writ of certiorari to the Supreme Court of the State of Kansas, to review its decision affirming the judgment of the District Court of Shawnee County, Kansas, overruling the demurrer of C. V. Browne, plaintiff, to parts of the answer of the Union Pacific Railroad Company, Defendant.

As shown by the petition of Browne in the trial court (Tr. 3), the facts briefly, are:

In October, 1920, Browne, a grain dealer of McKinney, Texas, bought four cars of white wheat (raised in Utah) from Ed Past, a grain dealer of Denver, Col-

orado, same to be shipped from point of origin by November 9th and sold the wheat to the Gladney Mill of Sherman, Texas for the same shipment. Time is the essence of all grain contracts and date of shipment is determined from the date appearing in the bill of lading, all as was well known to the Union Pacific as well as to the contracting parties. Wheat shipped from point of origin by November 9th was applicable on Browne's contract of purchase from Past and upon his contract of sale to the Gladney Mill; that shipped later was not. Past applied on his sale to Browne four cars of wheat which had ben shipped from Utah to Denver, diverting them on to Texas. He surrendered the original order bills which showed shipment of the four cars from Ogden, Utah, on *November 19th* to the Union Pacific agent at Denver, the scope of whose apparent authority included the issuance of such order bills and said agent executed and delivered to Past four "in lieu" or "exchange" order bills showing billing to Texas and also stating on the faces thereof that they were issued in lieu of original order bills issued at Idaho points *prior to November 9th* In other words, the exchange order bills were not correct, mis-stating the dates of original shipment.

Past took these misdated exchange order bills, endorsed them and attached to his sight drafts on Browne for the sale prices of the four cars of wheat, all pursuant to the usual method of tendering car lots of grain on sale contracts. Browne, in reliance on the recitations in the order bills, which showed original shipment of the four cars of wheat, within contract time, paid Past's drafts

upon presentation and thus became the owner and holder in good faith and for value of such four order bills.

Browne then sought to apply the four cars on his sale to the Gladney Mill, drawing his sight drafts on the Mill with said order bills attached. For some reason the Mill became suspicious of the actual dates of shipments and refused to rely on the recitations contained in the order bills as to shipping dates and refused to accept the four cars of wheat on its purchase from Browne until shown that they were actually shipped prior to November 9th as recited in said order bills.

Browne made every effort to ascertain the true dates of origin of said four cars of wheat but was refused information by the carriers and as Past had become insolvent and a fugitive from justice, he was unable to convince the Gladney Mill that the four cars were in fact shipped prior to November 9th and was forced to sell the wheat on the open market at the then low market price. While seeking information relative to the correctness of the order bills, $607.00 demurrage accrued on the four cars which Browne had to pay. Browne paid out a total of $11,601.16 for said four cars all in reliance on the correctness of the dates appearing in said order bills. Had the order bills been correct, he would have received $12,117.60 for the four cars but as a result of the misdating he received but $8,102.52 therefor. Browne then brought suit in the District Court of Shawnee County, Kansas against the Union Pacific Railroad Company to recover the loss which he sustained by reason of his reliance on such misdated order bills.

In its answer to his action (Tr. 9) the Union Pacific admitted Browne's contracts of purchase and sale as alleged but contended in the following numbered paragraphs of said answer:

3. That it had no notice or knowledge of such contracts or that the recitations of the order bills issued by it might be relied on.

4. That said exchange order bills were prepared by Ed Past, consignor, on forms furnished by it, all blanks therein being filled out by Ed Past, who presented such exchange order bills to its agent for his signature, who relied upon the good faith of Past in preparing such exchange order bills and signed same, his signature being procured by the fraud of Ed Past; it being without the scope of the authority of its said agent to sign bills of lading containing any false or erroneous statements.

5. That Browne should have awaited the arrival of the cars before paying Past's sight drafs, when the freight bills might have shown the true shipping dates or he should have surmised that the ladings might have been misdated.

Browne attacked such parts of the answer by motion and by demurrer (Tr. 12) on the theory that he purchased the order bills as negotiable instruments and hence that such paragraphs of the answer, particularly No. 4, would constitute no defense.

The trial court overruled both motion and demurrer (Tr. 1) and Browne, electing to stand on his demurrer, judgment was rendered against him (Tr. 1) and he ap-

pealed to the Supreme Court of Kansas.

Browne's contention has always been that the Federal Bill of Lading Act of 1916, known as the Pomerene Act (39 St. L. Ch. 415, p. 538) makes order bills negotiable and definitely makes the Union Pacific liable to him under the pleaded facts of the instant case.

In its opinion (Tr. 16) the Kansas Supreme Court passed squarely upon his contentions, holding definitely that the Pomerene Act does not make interstate order bills strictly negotiable and does not make a carrier liable to a purchaser for value of such an order bill for damages resulting from reliance upon erroneous dates appearing therein. And under that interpretation of the Pomerene Act it was of course further held that the liability of the Union Pacific was determined by the old Federal rule so often announced by this court, and that Browne, the purchaser of the mis-dated order bills, had no greater rights than the original consignor and that lack of authority of the Union Pacific agent to issue the mis-dated order bills constituted a defense to Browne's action.

And by its decision, to which three of the seven justices dissented, the Kansas Supreme Court affirmed the order of the trial court overruling Browne's demurrer to that part of the Union Pacific's answer which set up such defense. And it was to review such decision that this court issued its writ of certiorari herein.

SPECIFICATIONS OF ERROR.

The Supreme Court of Kansas erred in adjudging:

That want of authority of its agent to issue mis-dated order bills constitutes a defense to a carrier in an action brought by a holder thereof for value and in good faith for damages resulting from reliance thereon.

That the Pomerene Act does not make interstate order bills strictly negotiable.

That section 22 of the Pomerene Act does not make a carrier liable to a purchaser in good faith and for value of an order bill who relies upon the recitations thereot for damages caused by mis-dating thereof.

That section 22 of the Pomerene Act limits the liability of a carrier for a mis-description of goods in an interstate order bill to an erroneous "statement or recital of their character, of their sort, kind or species."

ARGUMENT.

Prior to the enactment by Congress on August 29, 1916, of the Pomerene Act (39 Stat. at L. Ch. 415, p. 538) it is clear that a carrier was not liable to an assignee thereof for the mis-dating of an interstate order bill. This court so held in *Atchison, Topeka & Santa Fe Rly. Co.* v. *Harold,* 241 U. S. 371, decided June 5, 1916, which involved a state of facts exactly similar to those herein. Therein this court reversed the Kansas Supreme Court which held that an innocent holder of a bill of lading was vested with rights not available to the shipper and that the carrier was liable to him for damages resulting from reliance upon a mis-dated order bill, and held that such local rule was in direct conflict with the Federal rule in such cases, as repeated in *Shaw* v. *North Pennsylvania R. Co.,* 101 U. S. 557; *Pollard* v. *Vinton,* 105 U. S. 7; *St. Louis, I. M. & S. Ry. Co.* v. *Knight,* 122 U. S. 79; *Friedlander* v. *T. & P. R. Co.,* 130 U. S. 416; and *The Carlos F. Roses,* 177 U. S. 655; referring to the absence of legislation by Congress attributing to order bills the characteristics given them by the Kansas Court.

It is our contention that the Pomerene Act was intended to and does entirely abrogate and change the old Federal common law rule and was intended to and does give to interstate order bills the very characteristics which the Kansas Supreme Court gave to them in the Harold

case. To indicate the difference between the old Federal rule and the provisions of the Pomerene Act we wish to advert briefly to the cited cases:

Shaw v. *Rly. Co.,* 101 U. S. 557, involves a stolen lading. In discussing the negotiability of bills and notes, the opinion states:

> "The purchaser is not bound to look beyond the instrument. * * * The rule was first applied to the case of a lost bank-note, * * * and put upon the ground that the interests of trade, the usual course of business, and the fact that bank notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchant's drafts and * * * to bills and notes, as coming within the same reason."

In differentiating between bills and notes and bills of lading, and in holding that the possessor of a stolen lading is not entitled to possession of the goods, unless a *bona fide* purchaser, it is further said:

> "The function of that instrument (lading) is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a *contract* for the performance of a certain duty. * * * Bills of lading are regarded as so much cotton, grain, or other articles of merchandise. The merchandise is often sold or pledged by the transfers of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions."

In *Pollard* v. *Vinton,* 105 U. S. 7, an agent of the owner of a boat issued a bill of lading for cotton not in fact received, and draft to which the lading was attached was paid in reliance thereon. Boat owner held not liable as agent had no authority to issue such a lading. Of a bill of lading it is said:

> "Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a *negotiable instrument* or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, *all inquiry into the transaction* in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fides* of purchasers only applies to it in a limited sense."

St. Louis, I. M. & S. Rly. Co. v. *Knight,* 122 U. S. 79, holds that as a carrier is not bound by a recital in a lading of receipt of goods which were not in fact received, it is not bound by such a recital as to the quality of goods received, which recital is untrue.

Friedlander v. *T. P. Rly. Co.,* 130 U. S. 416 holds a carrier not liable to the purchaser of a bill of lading showing shipment of cotton when in fact it received no cotton, following *Shaw* v. *Rly. Co.,* and *Pollard* v. *Vinton, supra.* In the opinion it is stated:

> "It is true that, while not negotiable as commercial paper is, bills of lading are commonly used as security for loans, and advances; but it is only as evidence of ownership, special or general, of the

> property mentioned in them, and of the right to receive such property at the place of delivery."
>
> "It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall on him who enabled such third person to commit the fraud."

But it is held that the carrier was not at fault as its agent, in issuing the lading, was not acting within the scope of his authority.

In *The Carlos F. Roses,* 177 U. S. 655, merchandise on an enemy vessel was captured and an English firm claimed same under bills of lading for which it had paid value. In denying such claim and declaring the goods lawful prize of war, this court said:

> "Bills of lading stand as the substitute and representative of the goods described therein, and, while *quasi-negotiable* instruments, are not negotiable in the full sense in which that term is applied to bills and notes. * * * Inquiry into the transaction in which the bill originated is *not* precluded because it came into the hands of persons who may have innocently paid value for it."

It is clear from these cases that under the rule upon which was based the decision of this court in the Harold case, order bills were not negotiable instruments and the doctrine of *bona fides* had no application. To indicate the great change wrought in the old rule by the Pomerene Act, we summarize the following numbered pertinent sections thereof:

(3) The *negotiability* of an order bill, defining same, shall not be affected unless agreed to by the shipper in writing on its face.

(6) A straight bill shall be marked "non-negotiable."

(7) A named notified party shall not limit the *negotiability* of an order bill.

(9) A carrier may deliver goods to one in possession of an order bill, unless (10) it had been notified or had information that such holder was not entitled to possession of the goods.

(11) A carrier shall be liable for non-delivery to a purchaser for value and in good faith of an order bill.

(20) When goods loaded by carrier insertion in order bill of words "Shipper's weight, load and count" shall be treated as null and void.

(21) When goods loaded by shipper carrier may insert in order bill the words "Shipper's weight, load and count" and if true it shall not be liable for improper loading, non-receipt or misdescription.

> (22) "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or *apparent* authority includes * * * the issuing of bills of lading * * * the carrier shall be liable to * * * (b) the holder of an order bill, who has given value in good faith, relying upon the *description* therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their *failure to correspond with the description thereof* in the bill at the time of its issue."

(27) An order bill, indorsed in blank, may be *negotiated* by delivery.

(28) An order bill may be *negotiated* by indorsement in blank or to a specified person.

(29) A *straight* bill *cannot* be negotiated free from existing equities and its indorsement gives the transferee no additional right.

(30) An order bill may be *negotiated* by anyone in possession thereof.

> (31) "That a person to whom an order bill has been duly *negotiated* acquires thereby—
>
> (a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith; and
>
> (b) The direct obligation of the carrier to hold possession of the goods for him *according to the terms of the bill* as fully as if the carrier had contracted directly with him."

(32) One to whom a bill has been transferred, but *not negotiated,* acquires title to the goods as against the transferor.

(33) Indorsement of an order bill transferred for value by delivery, may be enforced where essential for *negotiation.*

(35) Indorsement of a bill shall not make the endorser liable for the carrier's failure to fulfill its obligations.

> (37) "That the validity of the *negotiation* of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, * * * if the person to whom the bill was negotiated * * * gave value therefor in good faith, without notice of the breach of duty, * * *"

The whole intent and purpose of the act is obviously to change the old Federal common law rule and to give to order bills all the attributes of commercial paper, and the same kind and degree of negotiability that most state courts have always given to them, as instanced by the decision of the Kansas Supreme Court in the *Harold* case, *supra,* later reversed by this court.

The act clearly makes an order bill more than "a contract for the performance of a certain duty," the limitation fixed in *Shaw* v. *Bank, supra.* It makes an order bill *negotiable* and applies the doctrine of *bona fides* of purchasers in almost every section, thus changing the rule as announced in *Pollard* v. *Vinton* and *The Carlos F. Roses, supra.* It specifically gives to order bills attributes other than mere evidence of ownership of the goods conveyed, with the right to receive same, the only function allowed them in *Friedlander* v. *Rly. Co., supra.* And in binding a carrier by the acts of its agent within the apparent scope of his authority, it precludes the defense relied upon in the *Friedlander* and *Pollard* cases, *supra.*

Under the Pomerene Act the rights of one to whom an order bill has been negotiated comprise two elements —the liability to him of the indorser thereof, and the liability to him of the carrier issuing such order bill. As to the first element we are not concerned herein. As to the second elements, Sections 10, 11, 12, 22, 31-b and 35 all pertain to the liability of a carrier to a transferee of an order bill, thus clearly indicating a purpose to give to

order bills all the ordinary attributes of negotiable paper, as well as some additional ones.

But the Union Pacific, while conceding herein to a limited extent such intent and purpose of the Pomerene Act, contends that Section 22 of the act specifies particular instances wherein a carrier is made liable to an assignee of an order bill and hence that liability is limited to such specified instances. *"Expressio unius est alterius Exclusio."* This is true, of course, but in interpreting Section 22 and also Section 31, and in determining their meaning as applied to the facts of the instant case, the general purpose of the act is controlling.

Under the issues raised by the pleading herein, it is admitted that it was within the scope of the apparent authority of the Union Pacific agent to issue order bills; that Browne was a purchaser and holder of the bills involved herein, he having given value therefor, in good faith, relying upon the recitations contained therein as to dates when the shipments originated; that the actual dates of shipment did not correspond with the dates inserted in such order bills at the time of their issue; and that Browne was damaged because of relying on such mis-dated bills.

So the first question for determination by this court is whether, in view of the general intent and purpose of the Pomerene Act, the expression "description of the goods" contained in Section 22, refers merely to their physical attributes, or refers generally to a description of the *shipment*, as such, which would include place and date of origin.

The Kansas Supreme Court held (Tr. 19) that the Pomerene Act does not make order bills "unqualified negotiable instruments" "although it does clothe them with certain attributes of negotiable instruments" and further, that "it would be an undue extension of the statutory words 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a carload of goods is a statement or recital of their character, of their sort, kind or species." And suggests that a car of yellow corn, described as white, or a car of wheat described as oats, would be a mis-description within the purview of the act. Admittedly, but a bill of lading *never* contains the detail of the color or grade of grain, and did anyone ever hear of a single instance where wheat was billed as oats? Assuming that the act was intended to cover probable contingencies and to remedy known difficulties in the handling of order bills, it is very evident that Congress had no intent to delimit the meaning of the statutory words to the extent held by the Kansas Court.

An examination of the wording of Section 22, discloses that under its provisions a carrier is liable to a purchaser of an order bill, relying upon the *description therein of the goods,* for damages caused by *non-receipt* of any part of the goods. This is patently meant to apply in cases of over-billing. One purchasing an order bill in reliance on its recitation that the carrier had received 80,000 pounds of wheat, when in fact but 40,000 pounds had been received, can recover his resulting damage from such carrier. But note that the act refers to

reliance, not on the bill of lading weight, but upon the *description of the goods* contained in the order bill.

If, as the Kansas Supreme Court holds, a "description of the goods" can be no more than a recital of their character, kind, sort or species, it would not include the bulk weight of the *shipment*. And under that interpretation the act would mean that one who purchases an order bill covering shipment of a car of grain relying upon the recital therein of its *character, sort or kind,* that is, whether wheat, or oats, red or hard, can recover damages from the issuing carrier for *shortage in weight.* And that does not make sense. Why should an innocent purchaser of an order bill be allowed to recover on an over-billed car of grain, when he relied *not* on the bill of lading weight, but only upon the recital as to the *kind* of grain?

The attorneys for too many carriers are settling claims brought under this section, and based on over-billed cars of grain, for it to be said that it does not allow damages for the difference between the actual weight of grain received and the weight stated in the order bill.

So to give any meaning whatever to Section 22 of the act it must be held that the expression "description of the goods" as used therein, in connection with "non-receipt of all or any part of the goods," includes the bulk weight of the shipment and not merely the kind, sort or species of the commodity transported.

If the meaning of the statutory words, "description of the goods" has to be extended to include bulk

weight of the shipment, to give any force whatever to the non-receipt part of Section 22, would it be such an undue extension of the meaning of such words to also include other data concerning the shipment, such as date thereof?

It is our contention that Section 22 of the act was intended to mean, and does mean, that a carrier is liable to an innocent purchaser of an order bill, relying on the material *recitations* therein contained, for damages caused by the falsity or inaccuracy of such *recitations*, such as non-receipt of all or part of the goods as shown by the bill of lading *weight*, or mis-dating, or erroneous statement of place of origin, or a false recitation that the freight charges were prepaid, as well as mis-statements as to the kind, sort or species of commodity carried.

While every shipper and receiver of bulk freight is interested in the extent of the negotiability of order bills, the problems of grain dealers are illustrative of the reasons for their strict negotiability. Hundreds of millions of bushels, or hundreds of thousands of car loads, of bulk wheat alone are transported annually by the carriers of the middle west. And practically without exception such shipments are handled under shipper's order bills of lading. And the financing of such a crop movement is made possible only by the constant and repeated negotiation of such order bills. The country elevator, which buys direct from the farmer, is able to operate on a small capital and at the same time to pay cash, because of its ability, as soon as it has bought enough for a car load, to ship it out under an order bill, attaching

same to its sight draft on the wholesale dealer at some neighboring city, which draft its local bank gives it credit for, as a cash item, thus enabling it to buy more grain from the farmer. The wholesale dealer may sell the car of grain to another dealer, as Past sold to Browne the wheat in question herein, in which case he in turn draws with the order bill attached, and gets credit at once, at his local bank, enabling him to buy more cars of wheat. Then the second dealer may sell to an exporter, at the Gulf or on the Atlantic seaboard, or to a mill, as Browne had sold the wheat in question to the Gladney Mill at Sherman, and he likewise attaches the order bill to his sight draft which is credited as a cash item at his local bank. The mill in turn ships out its flour and feed stuffs under order bills, attached to sight drafts on its customers.

And this immense commerce is made possible by reliance by each successive purchaser of an order bill on the *recitations* therein contained. And what are such recitations? One of course is that of the *kind* of grain shipped, as wheat, oats or corn, but never as to their character or species, for no order bill of grain ever contains a recital of the grade, color, variety, test weight or quality of such grain. The weight appearing in an order bill of grain is most material, for the amount of the draft which the bank will discount, or the purchaser pay, is dependent directly upon the acknowledgment by the carrier in its order bill of the number of pounds of grain it had received in the numbered car. For seldom

if ever, does a puchaser of grain have any information, when he pays the draft of the seller prior to arrival of the car, as to the amount of grain in the car, other than the bill of lading weight. The point of origin is relied upon, also, for as an instance, it frequently happens that a mill will pay many cents a bushel more for wheat originating in a certain territory, because of its high protein content perhaps, or other known quality, than for wheat shipped from other points. The place of origin is also material in enabling the assignee to determine what freight charges will accrue before he pays his vendor's draft. And such assignee's knowledge, when he takes up the seller's draft with order bill attached, of the place of origin of the particular car, is based on the statement made by the carrier in such order bill. Also a statement in an order bill that freight charges have been prepaid, or not, is relied upon in paying a grain draft. If grain is sold at a price basis point of origin and shipped to Minneapolis, the seller pays the freight, either by prepaying same, or by deducting the amount from his draft and allowing the buyer to pay same. If an order bill is stamped by the carrier "freight prepaid" the buyer, in paying the seller's draft to which it is attached and in reliance thereon, would pay the full purchase price basis point of shipment. And if the freight was in fact not prepaid, if such recital was untrue, then in order to get his car of grain on its arrival he would have to pay the freight charges in addition to the purchase price.

And the date of shipment as stated in an order bill is always material, and relied upon. Recently a grain dealer attempted to borrow of a bank on an order bill the then market value of the 80,000 pounds of wheat covered thereby—a usual and common occurrence. The banker inspected the order bill which showed receipt by the carrier of the full amount of the wheat, but at a nearby town, ninety days before. That meant of course that the car of wheat had been on track and drawing demurrage for nearly ninety days, and consequently was worth several hundred dollars less than it would have been otherwise. In determining the then value of that car of wheat, on track, the banker had to, and did, rely both upon the date and place of shipment as stated in the order bill. If the date had been erroneous the banker might easily have been defrauded out of hundreds of dollars.

A decision illustrative of the importance of correct dating is: *Saugerties Bank* v. *Del. & H. Co.*, (N. Y.) 141 N. E. 904. Therein the carrier failed to take up order bills upon delivery of car lots of wheat, and the holder several months later changed dates thereon to show recent shipment and borrowed money thereon, holding the carrier not liable to the bank, because the criminal alteration of the bills, not the failure to require surrender thereof, was the proximate cause of the loss to plaintiff, it is stated that the bank relied on the misdated bills and of course would not have made the loan had the correct dates appeared.

But the most common instances of reliance on bill of lading dates are those such as herein, for time is the essence of every contract for the purchase of grain, and practically all such contracts are based on a specified time of *shipment*.

We wish particularly to call attention to the fact that it is not the date of *delivery* that is specified in grain contracts, as this court erroneously assumed in the case of *Santa Fe* v. *Harold, supra,* but the date of *shipment*. A contract for the sale of grain for shipment by January 1st is complied with if the grain is billed or shipped from point of origin by the specified date, regardless of date of delivery. All claims against carriers for delay in transit of grain shipments are made by the purchasers, not the sellers.

And in determining whether a shipment of grain sought to be applied on contract is in fact appliable thereon, the purchaser always inspects the date appearing in the order bill tendered to him, *and relies thereon*. If it shows shipment within contract time, then and not till then, does he pay the draft to which it is attached and becomes the holder for value of such order bill.

Surely Congress had in mind these usual, common and everyday commercial practices and customs when it enacted the Pomerene Act of forty-five sections, specifically making order bills negotiable and defining the duties of carriers as to assignees of such order bills and by Section 22 declaring the liabilities of carriers to purchasers thereof, in good faith and for value.

Presumably the recommendations of the American Bar Association, the various committee hearings had in Congress and the arguments therein relative to the necessity of a Federal Bill of Lading Act were premised on actual abuses or practices that needed remedying. Unquestionably one of such abuses was the issuance by carriers of order bills acknowledging receipt of a certain weight of grain or other commodity when in fact a lesser amount or none at all was received. But why should Congress concern itself in declaring carriers liable in such instances, and not in the other multitudinous instances in our commercial activities where erroneous statements in order bills result in damages to innocent purchasers thereof? In determining the conditions which Congress sought to remedy, why delve into the realm of conjecture to find possible examples of erroneous descriptions in order bills, such as describing yellow corn as white, or describing horses as hogs, when our commerce is replete with actual instances of damages resulting from reliance on mis-statements?

As stated in the dissenting opinion to the Kansas Supreme Court decision (Tr. 20), why insert the place and date of origin of a shipment in an order bill at all, except to give material information by such additional description of the shipment?

For the goods mentioned in Section 22 of the Act as being described in an order bill comprise a shipment, not goods exhibited at a county fair. It is the shipment that the purchaser of an order bill is concerned with—the kind and bulk weight of the commodity, place and

date of shipment, destination, consignor, freight charges to be paid, and routing, all data of which the carrier's agent has knowledge when he issues an order bill, and not the quality, variety or texture of the individual articles comprising the shipment and of which the agent would know nothing.

And note another inconsistency in the construction placed on the Pomerene Act by the Kansas Supreme Court. It rules, in effect, that though an agent of a carrier binds his principal when he states in an order bill the bulk weight of wheat shipped, of which he has no personal knowledge but relies on the statements of the shipper, or should he state therein the species or other physical attributes of such wheat, which he would have to go out in the railroad yards to ascertain, yet such agent does not bind the carrier, and acts without the scope of his authority when he inserts in the order bill the date thereof, a matter of which he has absolute knowledge. Or in the issuance of an exchange order bill, as in the instant case, where the agent had only to copy correctly the data appearing in the surrendered original order bill, it is held that no duty of accuracy is owing to those to whom such order bill may be negotiated.

That the Pomerene Act was enacted to remedy certain well-known evils which had become prevalent in commerce is shown by Senate Report No. 149, thereon, appearing at page 3833, Vol. 53, Part IV, of the Congressional Record. After stating that the bill was the

result of the labors of the commissioners on uniform laws of the American Bar Association, after repeated conferences with bankers, railroad and shippers organizations, it is said:

> "On these bills of ladings (interstate) it is estimated that $5,000,000,000 in cash was advanced annually by the banks. It must follow, therefore, that any reasonable legislation which will lead to the security of these bills of lading in the hands of their owners or holders must be of immense value to the commerce of the country."

After quoting from the decision in *Friedlander* v. *Rly. Co.*, 130 U. S. 416, holding that a carrier is not liable to a holder in good faith and for value of an order bill fraudulently issued by the carrier's agent without receipt of the goods named in it, it is further said:

> "This ruling has resulted in great loss to the buyers of merchandise who have the right to depend upon the *bona fides* of bills of lading, to bankers and financial men who have bought or discounted drafts secured by these bills of lading, and to sellers and buyers of cotton, grain or other merchandise, whose transactions are discredited by reason of the frauds which have been perpetrated by fraudulent shippers conspiring with freight agents. As a result millions of dollars have been lost to commerce."

While it happened that the case cited in the committee report dealt with a lading issued without receipt of any of the goods covered thereby, yet that evidently was not the only condition sought to be corrected for the report indicates clearly that the purpose of Congress was

to protect generally the *security* of order bills and to give holders thereof the right to depend on their *bona fides* in all particulars. And the Act itself, while making a carrier specifically liable for non-receipt of goods *described* in an order bill, then very obviously attempts to cover all other instances of untrue recitations that might be relied upon, without enumerating all that had or might occur, by making a carrier liable for failure of the commodity transported to correspond with its description in the bill.

The purpose of the Act being avowedly to assure the *bona fides* and security of order bills in commercial channels, why should it be presumed that Congress intended to legislate against less than all of the frauds that were being perpetrated by untrue statements in order bills?

That the mis-dating of order bills has long been an evil of commercial transactions and one which Congress must have had in mind when enacting the Pomerene Act, is further shown by rulings of the Interstate Commerce Commission.

On January 20, 1910, it issued the following order:

> "It having come to the attention of this Commission that in a number of instances carriers subject to the Act have, at the request of shippers, issued bills of lading under dates other than the dates of the actual receipt of the property by said carriers for transportation, and it further appearing that by means of such misdating of such bills of lading, the consignors thereof have perpetrated various frauds upon the consignees thereof.

IT IS ORDERED, That all carriers subject to the Act to Regulate Commerce be warned that a false entry as to date, or otherwise, upon a bill of lading, is a misdemeanor within the meaning of Section 20 of said Act, and that in case of any such false entry hereafter arising, criminal prosecution of those responsible therefor will be requested.

It is further ordered, that a copy of this order be served upon all parties subject to the Act to Regulate Commerce."

Later and on November 17, 1910, it issued a supplementary order, which, after quoting the foregoing order, added:

"An investigation by the Commission has developed the fact that certain rail carriers at Chicago, Ill., and at other points are issuing bills of lading showing a date prior to that upon which shipping instructions are received by the carrier. These bills of lading purport to show that cars are in course of transportation to named consignees on a date prior to that upon which such consignees are indicated to the carrier. In specific cases brought to the attention of the Commission this has resulted in loss to buyers of property through the presentation of such bills of lading as proof that shipments had been made on *contract days*, although such shipments had not been ordered forward until some days after the date shown in the bills of lading. Therefore,

It is further ordered, that all carriers subject to the Act to Regulate Commerce be warned that not only must property to be transported be in the possession of the carrier issuing bill of lading therefor at the time of such issuance, but such bill of lading must be dated as of the day upon which the shipping instructions are fully given and the carrier finally authorized to forward the property."

Then in 1911, a further order was made relative to dating bills of lading, wherein it was stated:

> "Some carriers date such bills of lading as of the day they are actually made. Others follow the date upon the switching ticket. The latter practice was the occasion for our order of November 17, 1910. The bill of lading contains the contract for transportation to a named destination. Such contract should be dated as of the day that it is actually made; that is to say, the day that such destination is indicated to the carrier and the shipment committed to it under the contract of transportation thereto. The practice of mis-dating bills of lading in such cases is not only a violation of the law against making false entries, but it has been the occasion for frauds upon purchasers *under time contracts*, to which frauds carriers should not be accessories."

And the facts appearing in the case of *Santa Fe* v. *Harold, supra*, again showed to Congress the commercial necessity of giving purchasers of order bills the right to depend upon the *bona fides* of the dates inserted therein by the issuing carriers.

The practice of mis-dating order bills and the resultant frauds upon purchasers under time contracts being so common as to require three separate orders of the Interstate Commerce Commission within two years, and the identical matter having been before this court, is it reasonable to assume that Congress, in legislating upon the subject of the negotiability of order bills, intended to protect innocent holders thereof only against misdescriptions as to bulk weights, and as to the sort or

species of commodity, and *not* to afford protection against such mis-datings?

While legal and judicial constructions of the Pomerene Act are few as yet, all agree that order bills are thereby made negotiable.

In *Matters of Bills of Lading*, 52 I. C. C. 671, the same tribunal which found it necessary to make three separate orders relative to mis-dated order bills, says:

> "The primary purpose of this law is to enlarge and enhance the negotiability features of 'order' bills of lading and by definitely fixing the law with respect to negotiability, and the imposition of *greater responsibility upon carriers*, to afford greater protection to those who in the course of *commercial* transactions handle and deal in such bills."

Yet if the contentions of the carrier herein are correct the only responsibility added to carriers for the protection of those purchasing order bills is liability for *non-receipt* of goods described therein.

Pioneer Trust Co. v. *Rly. Co.*, (Mo.) 224 S. W. 109, recognized the applicability of the old Federal rule to a shipment originating prior to the passage of the Pomerene Act, but in the opinion it is said:

> "The manifest hardship done the innocent holders of bills of lading by the rule found in Federal cases is alleviated to a great extent by the Pomerene Bill of Lading Act making interstate bills of lading *negotiable*."

Shaw Co. v. *Coleman*, (Tex.) 236 S. W. 178, does not involve the liability of a carrier but it does hold that

the carrier violated its duty under an order bill by delivery without an order of the consignee, an order bill being *negotiable*.

In *Rainbolt* v. *Sampson*, 259 Fed. 564 (8th C. C. A.) reference is made to the Pomerene Act as making order bills *negotiable* though the decision is not based on that point.

In *Rainbolt* v. *Sampson*, 259 Fed. 564 (8th C. C. A., referring to the Pomerene Act, states:

> "The evident intention of the act is to make straight bills of lading non-negotiable and order bills *negotiable*."

In *New York P. R. S. S. Co.* v. *Lumber Co.*, (1 C. C. A.) 284 Fed. 513, the shipper recovered from the carrier for mis-delivery under an interstate order bill. The judgment was affirmed and the following instruction was approved:

> "I charge you as a matter of law that the bills of lading involved in this case, and upon which the shipments referred in evidence were made, are *negotiable* order bills of lading."

American Hide and Leather Co. v. *So. Rly. Co.*, (Ill.) 142 N. E. 200 construes the Illinois Uniform Bill of Lading Act and holds:

> "The purpose of the statute was to give security to bills of lading in the hands of those who parted with value in good faith, relying on their being *true*. A Federal Bill of Lading Act contains a provision (22) substantially like Section 23, appliable to interstate commerce."

In *Pere Marquett Rly. Co.* v. *French,* 254 U. S. 538, considerable light is thrown upon the purposes of the Pomerene Act. Therein was involved the liability of a carrier for delivering a car of goods without requiring a surrender of the bill of lading. In the opinion it is said:

> "Prior to the enactment of the Pomerene Act, bills of lading were *not* negotiable instruments and one who did not have valid title to the goods could not by transfer of the bill of lading, give a good title to a *bona fide* holder."
>
> "When, in the interests of commerce, the Federal Uniform Bill of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect the *bona fide* purchaser of such bills it was deemed proper to afford also certain protection to the carriers."
>
> "The purchaser whom the act protects is he who is entitled to assume that the carrier has not delivered the goods and will not thereafter deliver them except to a person who holds the bill of lading. The purposes of Sections 10, 11 and 12 is to give bills of lading *attributes of commercial paper.*"

Leigh Ellis v. *Payne,* (Ga.) 274 Fed. 443, holds that a carrier issuing an order bill for 200 bales of cotton, weight (subject to correction) 99,300 lbs. is not liable to a purchaser of the order bill for underweight, as Sec. 20 of the Pomerene Act, relative to package freight, applies and not Sec. 22.

It is also held that any liability as to weight is qualified by the "subject to correction," although "This conclusion militates greatly against the attainment of one of

the aims of the Bills of Lading Act." Also, relative to recitations in an order bill covering bulk freight, it is said, "Section 22 imposes a liability for failure in *accuracy* of the statement so made in an order bill, making them in *effect warranties.*"

It is further held that recovery from the carrier was barred by the two-year limitation in the order bill itself, and on this ground the decision was affirmed by the Fifth Circuit Court of Appeals in 276 Fed. 400.

On writ of error to this court, 260 U. S. 682, such decision of the Court of Appeals was affirmed on the sole ground that the action was barred by the limitation of the bill itself, which required that "suits, for loss damage or delay" must be brought within two years and a day. It was contended that the words, "loss, damage or delay" applied only to the physical goods and not to statutory liability arising from *misdescriptions* in the order bill. But this court held that liability for over-billing "is of the kind that the clause 'suits for loss, damage or delay' manifestly *intended* to limit, and we see no reason why it should not be included under the head of loss."

If this court interprets the clause, "loss, damage or delay" is intended to include liability for over-billing, then surely it would be as reasonable to hold that the clause "description of the goods" in an order bill covering their shipment was manifestly *intended* to include the date of their shipment.

As said by Mr. Justice Reynolds of the concept "property"—

> "The accurate delimitation of the concept 'description' would afford a theme especially apposite for amplificative philosophic disquisition."

If, as held by the Kansas Supreme Court, a description of anything is limited to a recital of its kind, sort or species, a description of a girl is complete without including the date and place of her origin, though that data might alone be informative as to her age, temperament, disposition, nationality and even size, looks and complexion. So the date of shipment of a car lot of eggs or perishable fruit might be highly descriptive thereof.

Considered with the other sections of the Act, Section 31 is highly significant under the facts of the instant case, it providing that one to whom an order bill has been *negotiated*, thereby acquires the direct obligation of the carrier to hold the goods for him *"according to the terms of the bill."* Some of the terms of an order bill are that the carrier acknowledges receipt of a named quantity of goods at a certain place and *time* and agrees to transport same to a designated place. In the instant case one of the terms of the bills was that the wheat had been shipped originally on certain dates. The Union Pacific did not hold possession of such wheat for Browne according to such terms, for that was impossible, hence it breached its direct obligation to him.

So regardless of the provisions of Section 22, the Union Pacific became liable to Browne for such breach, and the circumstances under which the false terms were

inserted in the bills could constitute no defense to an action for damages therefor.

Opposing counsel have contended that Section 3 of the Act imports an intent *not* to make order bills strictly negotiable, it providing:

> "Any provision in such a bill * * * that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper."

Surely the very wording of this section indicates the complete negotiability of order bills, for unless agreed to in writing, any limitation of negotiability is *null and void*. Patently the expression "within the meaning of this Act" applies to those attributes given thereby to order bills which would not be found in ordinary negotiable paper, such as negotiation in blank, duties of consignor to his assignee, right of transferee to compel indorsement by transferor where essential for negotiation, and the freedom from liability of an indorser for failure of the carrier to fulfill its obligations. Section 3, instead of limiting the strict negotiability of order bills, gives to them attributes of negotiability not found in ordinary commercial negotiable paper.

And taken in connection with other sections of the act the provision of Section 3 that negotiability shall not be affected within the meaning of the act certainly does not circumscribe such negotiability. Other sections provide:

7. That the naming of a notify party "shall not limit the negotiability of the bill"; 27 and 28, that an order bill may be negotiated in blank and by delivery; 29, that a *straight* bill can*not* be negotiated free from existing equities; and 30, that an order bill may be negotiated by anyone in possession. Why differentiate between straight and order bills, declaring that the former can*not* be negotiated *free from existing equities*, if it was not intended that order bills *could* be negotiated free from such equities?

It seems apparent that Section 3 of the act broadens rather than narrows the scope of the negotiability of order bills. An act merely declaring order bills to be negotiable would not have given to them all the various attributes, rights, powers and qualities that the Pomerene Act does. So Section 3 might well have declared null and void any restriction of negotiability within the meaning of *any* of the provisions of this act.

The Pomerene Act itself, and the judicial decisions construing same, all clearly manifest an intent to make carriers liable for inaccuracies appearing in order bills. And no provision or section of the act limits such liability. And if a carrier is liable for mis-statements of fact appearing in order bills issued by its agent, then it could constitute no defense that such agent was without authority to issue such inaccurate order bills.

Conclusion.

It is for this court to determine herein the degree of negotiability given to interstate order bills by the Pomerene Act, and to construe the provisions of Section 22 thereof.

The limitation of the negotiability of shipper's order bills of lading by the application of the old federal common law rule led to numerous evils and abuses in the attempted negotiation thereof. Shippers would collude with the agents of carriers and procure the issuance of order bills showing the receipt of goods when in fact no goods were received by the carrier for transportation, or showing receipt of goods on a certain date when not in fact received until later, all resulting in loss to buyers of such order bills who relied upon the recitations therein as proof that the goods were in fact received by the carrier, or that the shipments had been made within contract time. As immense sums were advanced annually by banks and merchants in reliance upon the recitations of order bills, it became necessary, in the interests of commerce and trade, to protect the security thereof and to protect purchasers thereof who depended upon their *bona fides*. So in 1916 Congress enacted the Pomerene Act, the whole intent and purpose thereof being patently to make order bills strictly negotiable and to afford every protection to those who, in the course of trade, gave value therefor, against not only the indorsers thereof but also against the errors and frauds of the carriers issuing same.

The act specifically makes a carrier liable on an order bill issued by its agent the scope of whose real or apparent authority includes the issuing of order bills, to a holder thereof for value and in good faith, who relies upon the description therein of the goods, for damages caused by their failure to correspond with such description. Does that mean that a bank, or grain dealer, in advancing money on order bills, can rely upon statements in such order bills as to the kind, sort or species of the goods described in the order bill, but cannot rely upon statements descriptive of the shipments itself, such as date and place of origin, routing, payment of freight charges, destination, or name of consignor? The Supreme Court of Kansas so held, and it is for this court to determine whether such decision was correct.

Browne, petitioner herein, is one of those whom the Pomerene Act obviously sought to protect. The Union Pacific, through the fraud or carelessness of its agent, loosed in the channels of trade certain order bills which contained untrue statements descriptive of the shipments, which untrue statements were relied upon by Browne, to his damage. He assumed, of course, that the recitations in the order bills which he purchased were accurate, not only as to the kind of goods transported and their weight, but as to the dates when the shipments originated.

As indicated by the orders of the Interstate Commerce Commission relative to mis-dating order bills, Browne is but one of thousands who rely upon the

dates appearing in order bills as proof that the shipments originated within contract time. And if the liability of a carrier for untrue statements appearing in order bills is to be limited, as held by the Kansas Supreme Court, then Congress failed signally, in the Pomerene Act, of its avowed purpose to afford security to such bills and to protect those who depend upon their *bona fides*.

Surely the intent of Section 22 of the Pomerene Act, construed in connection with the other sections of the act, is to make carriers liable for inaccurate or untrue recitations in order bills, where such recitations are relied upon by purchasers in good faith and for value, to their damage.

And if this is true, it follows that it can be no defense to a carrier, when such damages are sought to be recovered, that it was without the scope of its agent's authority to issue order bills containing such untrue and inaccurate statements.

Those parts of the answer filed by the Union Pacific in the trial court, and which were attacked by demurrer, constituted no defense to Browne's action for damages and it was error to overrule the demurrer thereto, and it was error for the Kansas Supreme Court to affirm such ruling.

Petitioner earnestly insists that the decision of the Kansas Supreme Court should be reversed and that this case should be remanded for further proceedings in accordance with the true meaning and intent of the Pomerene Act.

Respectfully submitted,

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